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01-1118 and 01-1119

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

01-1118

Scheidler, et al.,

Petitioners,

v.

N.O.W., et al.,

Respondents.

and

01-1119

Operation Rescue,

Petitioner,

v.

N.O.W., et al.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Seventh Circuit

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Brief *Amici Curiae* of TEXAS BLACK AMERICANS FOR LIFE and L.E.A.R.N. (the Life Education And Resource Network) In Support of Neither Party.

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INTEREST OF THE *AMICI*

The *amici* are organizations of African-Americans which conduct demonstrations in front of abortion clinics and participate in sidewalk counseling of mothers and their associates approaching such clinics. We expect these activities to be affected by the cases at bar. Had the Court accepted the First Amendment issues, the *amici* would have filed a brief in support of the petitioners. However, in deference to this Court's decision not to take those issues, we focus instead on the wording of what the Court says in these cases rather than on this Court's actual holding itself in order to help ensure that the Court's opinion will not conflict with the Court's own First Amendment jurisprudence.

SUMMARY OF ARGUMENT

To avoid the First Amendment issues, the Court must not imply that the government may now prohibit by civil actions any conduct which it may not, under the First Amendment, prohibit by criminal law. To do otherwise would run afoul of this Court's holding in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This would also run afoul of *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Boyd v. U.S,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Also, undermining both *Sullivan* and *Gault* at the same time, both of which are "Warren Court" cases, may be perceived as a political attack.[1]

ARGUMENT

TO AVOID THE FIRST AMENDMENT ISSUES, THE COURT'S OPINION MUST NOT CONFLICT WITH *New York Times v. Sullivan.*

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this Court said, with respect to freedom of speech protected by the First Amendment,

> "What a State may not constitutionally bring about by

[1] As per Rule 37.6: Counsel of record is the sole author of this brief. No monetary contribution was made toward its preparation or submission by any one other than the *amici*, the members thereof, or counsel of record.

means of a criminal statute is likewise beyond the reach of its civil law of libel." Sullivan, 376 U.S. at 277, 84 S.Ct. at 724, 11 L.Ed.2d at 705.

As this Court explained:

> "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. [citation omitted] ... And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." Sullivan, 376 U.S. at 278, 84 S.Ct. at 724-725, 11 L.Ed.2d at 705.

This Court then used this same point of logic three years later in the field of juvenile justice. *In re* Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). As this Court said, concerning a juvenile's right against self-incrimination,

> "Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply." Gault, 387 U.S. at 49, 87 S.Ct. at 1455, 18 L.Ed.2d at 558.

The Court rejected this argument, saying,

> "To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." Gault, 387 U.S. at 49-50, 87 S.Ct. at 1455, 11 L.Ed.2d at 558.

Self-incrimination, of course, is entirely outside of the field of First Amendment jurisprudence. *A fortiori*, it would not be unprecedented for this Court to recognize the importance of this principle outside of the law of libel (the subject of *Sullivan*)

and recognize its importance in the cases at bar.

Years earlier, this same rationale also underpinned this Court's holding that any law which requires an adult to testify against himself outside of a criminal trial (though in a matter which could ultimately lead to a criminal trial) would have to afford the party a means of preserving his Fifth Amendment right not to testify against himself in any such later criminal proceeding. Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), U.S. v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

We wish to remind this Court of what it said in *Boyd*:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,---that is, civil in form,---can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens ...? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one... As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all purposes of ... the fifth amendment ... It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." Boyd, 116 U.S. at 634-635, 6 S.Ct. at 534-535, 29 L.Ed. at 752.

In the civil actions at bar, then---in which plaintiffs effectively act as private attorneys general---even the mere potential to run afoul of the First Amendment must be seen as being at least a threat of some kind to this Court's well-established law. This point is most strikingly seen with respect to *Sullivan*, in which

the newspaper and civil rights defendants were not even remotely acting in a manner similar to a private attorney general, and which had no quasi-criminal aspects to it. And thus, of all these prior cases, *Sullivan* is the one most placed at risk. For if the Court today by its silence on the First Amendment issues implies that even the cases at bar have no conflict with the First Amendment, how could one possibly then conclude that this Court would find no such conflict in *Sullivan*?

Avoiding any conflict with the First Amendment may be difficult to do, given the long, drawn-out legal battles which have already ensued. The difficulty may be even greater, given the fact that any alleged conduct herein not protected by the Free Speech Clause is readily severable from the protected conduct and thus can be adequately addressed by statute by other means. For this can be done without imposing upon those who engage in protected speech and conduct the threat of draconian remedies, especially a threat which exists in a legal system in which only expensive and time-consuming adjudication, it would seem, can ultimately sort out---*after the fact*---what conduct and speech are protected and what are not. And given the very recent ruling *en banc* by the Ninth Circuit on Free Speech issues in the so-called Nuremberg Files abortion protest web site case, the lower courts will be in even greater need of a clear, uncontradicted voice from this Court's precedents to guide them. Planned Parenthood v. American Coalition of Life Activists, No. 99-35320, slip op. (9th Cir. May 16, 2002).

Thus, to maintain the integrity of the First Amendment, while simultaneously avoiding First Amendment issues, the Court must now take care to ensure that nothing in its opinion shall imply that the Court is moving away from the reasoning of *Sullivan*, *Gault*, and *Boyd*, the great cost of the cases at bar and the years of litigating them notwithstanding.

We also ask the Court to bear in mind, in considering these cases, one very pertinent, important, and peculiar thing: None of these three lead cases, though they pursued parallel lines of thought, cited each other as an authority. *Sullivan* could have cited *Boyd* (and *Counseiman*). *Gault* could have cited all three. And *Gardner* and *Kordel* could have cited *Sullivan* and *Gault*. Yet they did not.

What does this say to us? What is the message to be learned? It is not hard to see, for it is simply this: The principle that a government cannot do by its civil actions that which it cannot do by its criminal law is so well-rooted in our law---so intertwined as an inherent part of the logic and structure and the very fiber of our constitutional jurisprudence---that it may be picked up on in unrelated contexts without even a need to make reference to prior case law on point, and with counsel and the Court apparently even being completely oblivious to these prior cases.

Such a pattern as this---has the Court seen its like before? And if so, was such reasoning and well-rooted principle then simply abandoned? We should hardly think so then. And we certainly hope not now.

We therefore ask this Court to state expressly in its opinion specifically how it avoids the First Amendment issues and leaves *Sullivan* (as well as *Boyd* and *Gault*) fully intact; we also ask this Court to at least state, at a minimum, that it expressly reaffirms these prior cases. Failure to do so may lead to a line of cases in which the Court may be perceived as gradually moving away from these cases, leaving the status of all of them---or at least their potential application to new areas of law in future cases---weakened and in doubt.

In addition, given the fact that both *Sullivan* and *Gault* were from the so-called Warren Court, this Court must be mindful of the fact that any perceived disfavor toward the rationale of those cases might be deemed political in nature. And departing from the reasoning of even older precedent, unchallenged since *Boyd*, could be a further embarrassment to this Court.

CONCLUSION

We ask the Court to enter an appropriate order and opinion.

Respectfully submitted,
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Counsel of record.